Defendant railroad then laid back until the next-to-last day for filing its motion for a new trial, then filed the same and initiated the proceedings leading to this *second* request for Certiorari.

This second appeal has come before this Court because of the railroad's objections to the ruling of the trial court in denying its motion for new trials, another salient fact which is not mentioned by the railroad in its brief here. As this Court well knows without citation of authority, the decision of the trial court on such motion is entirely discretionary.

In its brief on appeal to the Court of Appeals, and in this, the second appeal, the railroad presented the same contentions regarding judicial notice and alleged deprivation of constitutional rights as are contained in its present Petition for Certiorari.

The District Court had made mention, during argument after the first appeal, that it was obvious that the railroad was guilty of deliberate delay and attempting to string the case out to the very last moment. This was pointed out by respondents in their brief to the Court of Appeals and a motion to advance the hearing of the second appeal was made in that Court. This motion was granted by the Court of Appeals and oral argument was heard December 1, 1965.

On December 10, 1965, the Court of Appeals issued its order expressly approving the well-considered opinion of the trial judge in denying the motion for a new trial.

Each and every point now urged for the second time by the railroad was previously urged upon this Court, the Court of Appeals and the trial court.

ARGUMENT

I.

Where on a second appeal based upon exactly the same evidence as was considered in the first appeal, petitioner again raises the same contentions which it had the full opportunity to and did urge on the first appeal, both in the Court of Appeals and here (Cert. den. 379 U. S. 960), is this Court obliged to again consider the same contentions a second time, in view of the doctrine of the Law of the Case?

It was pointed out by your respondents to the Court of Appeals that many of the points urged on this second appeal had been argued previously, and the Court agreed that it was not obligated to reconsider its previous decision over again, asking counsel for the railroad during oral argument to go on to new material which the railroad had not previously presented. This occurred when counsel for the railroad attempted to place before the Court of Appeals for the second time all of the burdensome minutiae of the details of the accident. The Appellate Court was correct in doing this because these same matters had been urged there before, considered and disposed of.

They have also been argued here before, and are now being pressed upon this Court for the second time.

For the sake of expediency and economy, respondents respectfully pray reference to the earlier briefs in these cases, both in this Court and below, where these matters are specifically pointed out.

The doctrine of "The Law of the Case" encompasses all legal issues which might have been raised upon the former appeal as well as those which actually were raised. In the

case at bar, there was no second trial ordered or had, so that there are no new facts which were not presented or could not have been presented when these cases were tried to the jury.

The Law of the Case rule applies even more strongly in a case, such as this, where not only the opportunity was presented for petitioner railroad to raise the points it is now seeking to make again, but it actually did raise them in its previous Petition for Certiorari.

As is said by the editors of American Jurisprudence:

> "* * * It is generally held that on questions determined by an intermediate Appellate Court, its decision constitutes the Law of the Case after the judgment becomes final if the party seeking the second appeal failed to challenge the prior determination of the intermediate Appellate Court in the Court of last resort, in other words, if the decision of the Appellate Court was appealable, but no appeal was taken from it, or if the higher Appellate Court confirmed, or refused to review the prior determination of the intermediate Appellate Court."
>
> *5 Am Jur 2d,* Appeal and Error, 191.

Although this Court, in denying Certiorari the first time, and the Court of Appeals in denying the Petition for Rehearing following the earlier appeal, did not write opinions setting forth their grounds for finding no merit in these contentions of the railroad, the decisions are conclusive and it must be noted that the railroad has already had its full opportunity to raise all of these points and has already presented them. The Court of Appeals, the trial court, and, as a matter of fact, this Court, have previously considered these claims and found them to be without merit.

The "law of the case" has similarities with *res adjudicata.* It is a necessary doctrine and must be applied peremptorily where a stubborn, losing litigant seeks to cause delays. Any deviation from that principle would result in endless litigation, long deferments, needless expenses and postponement of finality. The Court is not required to repeatedly listen, through these second appeals, to criticism of its earlier decisions and opinions in the case. *General Am. Life Ins. Co. v. Anderson,* 156 F 2nd 615 (C. A. 6); *Hildreth v. Union News Company,* 315 F. 2nd 548 (C. A. 6).

5 Am. Jur. 2nd, Section 744, states that the term "law of the case" is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court.

After the Circuit Court of Appeals' Mandate to the trial court, petitioner embarked on another series of motions at the trial court level. The trial court found the railroad guilty of "deliberate delay" in drawing out these proceedings. The point was made by your respondents in the Court of Appeals that the present second appeal was instituted merely for the purpose of retardment, to cause respondents further unnecessary expense, and was in fact wholly without merit.

In fact, upon the argument of this second appeal in the Court of Appeals, the Court directed counsel for petitioner railroad to state petitioner's reasons why a penalty should not be imposed upon the railroad for delay and vexation in these appeals, and quite properly refused to allow the railroad to re-argue the same points which it had argued before, since those matters had already been considered and decided. The same principles apply here.

II.

Where no constitutional rights were involved in the Court of Appeals' decision which contained *dicta* taking judicial notice of a commonly accepted fact which was not decisive of the case, and that decision did not conflict with any other decisions of this Court or any other Court of Appeals, and was in harmony with governing Michigan law as well, certiorari should be denied.

Turning to the merit, if any, in the contentions of petitioner railroad that it did not have its day in Court, it must be pointed out that the contentions presented upon this second request for certiorari were all answered in the earlier brief of respondents to the similar Petition in this Court in 1964.

It was there pointed out that the complaints regarding the taking of judicial notice by the Court of Appeals were entirely specious, since the Court of Appeals had a perfect right to take notice of a commonly accepted fact.

Moreover, petitioner claimed then, as it does again now, upon this successive appeal, that it had no opportunity to present evidence on the movability of the stalled car. Respondents furnished this Court with a transcript of testimony at the trial showing that this subject had indeed been gone into and that the railroad had every opportunity to bring in its evidence on this point. It offered none.

It was further shown that the decision of the Court of Appeals upon the former appeal was actually a vindication of the right to trial by jury, reinstating as it did the verdict of the jury after 3½ weeks of trial, in which the railroad had had every opportunity to bring forth whatever evidence it wished concerning this occurrence.

It was also pointed out in the brief of respondents in opposition to the first Petition for Writ of Certiorari that

the mention in the Court of Appeals' decision of the fact of which it took judicial notice constituted nothing more than *dictum* and that the decision did not turn upon that point. As a matter of fact, in that portion of the decision, the Court of Appeals was discussing the fact that the automobile might have been started along with several other possible beneficial effects which could have occurred if the railroad's train crew had applied their brakes as promptly as they should have in the exercise of reasonable care.

It was also pointed out by respondents in the former appeal that the Court of Appeals' decision was in harmony with Michigan law and did not conflict with the decisions of any other Courts of Appeal, and that in fact there was absolutely no constitutional or other pressing public question involved in this case. Nor is there any now.

The petitioner railroad failed to show this Court any decisions from any Court of Appeals or other Court conflicting in any way with the decision of the Court of Appeals in this case, and in addition the railroad has failed on this second appeal to show any such conflict, either. This application for Certiorari is without merit and wholly redundant.

CONCLUSION

In view of the fact that the matters complained of by petitioner railroad in its request for Certiorari have all been raised in this Court before, upon a previous request for Certiorari upon the former appeal, and in view of the fact that no constitutional or public questions of any kind are involved, the Petition for a Writ of Certiorari should be denied again.

Respectfully submitted,

FREDERICK D. JASMER and
JOSEPH A. CASSESE,
Attorneys for Plaintiffs-Respondents,
1226 Guardian Building,
Detroit, Michigan 48226.

JOHN VON BATCHELDER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1965

No. 992

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,

vs.

EUGENE LUDWIG, as Guardian of the Estate of Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO., a Michigan Corporation, as Subrogee of John Zatek, Cause No. 22025,
Respondents

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. STRAUB and
JAMES R. GANNON,
6-102 General Motors Building,
Detroit, Michigan 48202,
Attorneys for Petitioner, The Chesapeake and Ohio Railway Company.

Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan